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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TONY J. VIOLA, PRIVATE FIRST CLASS,
UNITED STATES ARMY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether a military accused is denied his right to due process of law under the Fifth Amendment when he is convicted of premeditated murder by the nonunanimous verdict of a general court-martial composed of less than six members.

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

TONY J. VIOLA, PRIVATE FIRST CLASS, UNITED STATES ARMY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner, Private First Class Tony J. Viola, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (C.M.A. 1988) (Appendix A), has not yet been officially reported. The decision of the United States Army Court of Military Review is also unreported, CM449157 (A.C.M.R. 1988) (Appendix B).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on December 1, 1988. The jurisdiction of this court is invoked under 28 U.S.C. 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides: Amendment V:

> "No person ... shall be deprived of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

The Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. 801 et. seq (Supp. IV 1986) provides:

> Article 52(a)(2): No person may be convicted of any other offense, except as provided in Section 845(b) of this title (Article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.
>
> Article 52(b)(2): No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

STATEMENT OF THE CASE

On March 3, 1986, the petitioner killed Corporal Jon R. Watson. Subsequently, the petitioner was tried by a general court-martial composed of officers and enlisted members on charges of premeditated murder and felony murder

in violation of Article (Art.) 118, UCMJ 10 U.S.C. 918. At trial, the petitioner admitted the act of killing Watson. The government sought to prove that the petitioner premeditated the killing and deserved the death penalty. The petitioner's sole defense was that the killing was not premeditated, but rather the result of his spontaneous venting of pent-up hostile feelings towards Watson which were provoked during an altercation initiated by Watson.

The petitioner pleaded not guilty to the charges and sought a trial forum which would produce an accurate result. First, the petitioner requested enlisted court members (R. 8). Then, in reliance on the federal court rule granting 20 peremptory challenges in a capital case, the petitioner sought and was denied three peremptory challenges (R. 104-108).

Next, the petitioner moved that his court-martial contain at least six members (R. 108). The military judge deferred ruling on the motion because the convening authority had detailed ten members.

The petitioner then moved for ruling that the convening authority's personal selection of the court-martial members violated due process and the petitioner's entitlement to a fair and impartial trial. The military judge denied the motion (R. 185).

Relying on both the Sixth Amendment right to trial by jury and due process considerations, the petitioner moved that the court-martial include at least six members (R. 431-438). The military judge denied the motion on the ground that Art. 16, UCMJ, requires only five members (R. 440). Finally, petitioner moved for a

change in court membership on the basis that requiring each member to be willing to adjudge the death penalty produced a court more prone to convict (R. 440-441). The military judge denied the motion (R. 446).

After all defense challenges for cause were granted, and each party exercised its one peremptory challenge, five members assembled as the court. Prior to the members' deliberation of findings, the military judge instructed the members that the concurrence of two-thirds or four of the five members, was required for any finding of guilt (R. 1475). He further instructed the members that if they reached an unanimous finding of guilty to premeditated or felony murder, the unanimous finding was to be announced (R. 1476). After 51 total

minutes of deliberation, the President announced that two-thirds of the members found petitioner guilty of premeditated murder (R. 1481, 1489), App. Exh. XLIII.

Therefore, unlike all previous petitions considered by this court in which standing may have been an issue, the petitioner in this case has a clear and unique standing - he was convicted of premeditated murder by four members of a five member general court-martial.

The petitioner was sentenced to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to Private E-1. The constitutional question involved herein was litigated at trial and at every stage of the appellate process.

REASON FOR GRANTING THE WRIT

CONVICTION OF PREMEDITATED MURDER BY THE NONUNANIMOUS VERDICT OF A GENERAL COURT-MARTIAL COMPOSED OF LESS THAN SIX MEMBERS VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. The Requirements of Minimum Due Process Must Be Re-evaluated in the Context of the Court's Recent Expansion of Court-Martial Jurisdiction.

Courts-martial have never been subject to the jury trial requirements of the Constitution. United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986). The due process clause nevertheless requires that court-martial procedure foster accurate factfinding. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). Courts-martial accused and the United States share a compelling interest in the accurate disposition of cases. Ake v. Oklahoma, 470 U.S. 68, 79 (1985).

The petitioner has been condemned to spend the balance of his natural life in confinement by a process which has been deemed inherently suspect and consistently infirm by every jurisdiction in the United States, except one.

The basis upon which military courts have distinguished a soldier's due process protections from those afforded every other citizen has been vitiated by this Court's decision in Solorio v. United States, 107 S.Ct. 2924 (1987). In Solorio, the Court greatly expanded court-martial jurisdiction and expressly declined to consider the due process claim since that claim had not been raised earlier in the appellate process. Id. at 2933 n. 18. The petitioner's due process claim has been litigated at every stage of trial and appeal and offers this court the exceptional opportunity to

establish the basic parameters of minimum due process in military criminal jurisdiction.

B. As the Severity of the Punishment to Which the Accused is Exposed Increases, So Too Must the Degree of Due Process Afforded.

To facilitate factfinding at general courts-martial, Congress has provided that such courts, designed to dispose of nonpetty offenses, consist of "not less than five members." Art. 16(1)(A), UCMJ, 10 U.S.C. 816(1)(A) (1982). In a non-capital case, only two-thirds of such members need concur in a finding of guilty. Art. 52(a)(2), UCMJ, 10 U.S.C. 852(a)(2).

Nevertheless, both Congress and the President have required that findings in capital cases be more accurate. When the death penalty is mandatory, the findings

of "not less than five members" must be unanimous. Art. 52(a)(1), 10 U.S.C. 852(a)(1). The President has additionally provided that the nonmandatory imposition of the death penalty may be considered only after entry of unanimous findings. Rule for Courts-Martial (R.C.M.) 1004(a)(2), Manual for Courts-Martial, United States 1984, (M.C.M. 1984).[1] Neither Congress nor the

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1. This provision became effective in February 1986. App. 21, R.C.M. 1004(a)(2), M.C.M., 1984. Thus, at petitioner's trial in May 1986, it became necessary to determine whether the finding of premeditated murder was unanimous. The discovery of a nonunanimous finding eliminated the death penalty as a possible punishment. It also created petitioner's standing to attack the procedure which produced the 4-1 vote. Burch v. Louisiana, 441 U.S. 130, 132 n.4 (1979). The petitioners in United States v. Garwood, 20 M.J. 148 (C.M.A. 1985), cert. denied, 474 U.S. 1005 (1985) and United States v. Hutchinson, 18 M.J.

President has required unanimous findings of premeditated or felony murder, the two findings for which Congress has provided for a mandatory minimum sentence of imprisonment for life. Art. 118, UCMJ, 10 U.S.C. 918. Accordingly, while the less accurate nonunanimous finding of five members protected the petitioner from the death penalty, it nevertheless provided the predicate for the petitioner's mandatory sentence to life confinement.

This Congressional and Presidential procedure for findings and sentence in the most serious cases recognizes the well-established Due Process concept that the process which is due depends to a large extent upon the interests at

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281 (C.M.A. 1984), cert. denied, 469 U.S. 981 (1984) lacked such standing because they failed to discover whether the findings at trial were nonunanimous.

stake.[2] It fails to acknowledge, however, the compelling interest of both the petitioner and the United States that no accused, including the petitioner, be deprived of liberty for life on the basis of unreliable findings. Thus, it must be scrutinized under the test adopted to resolve criminal due process concerns. The test balances three factors:

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2. Congress specifically recognizes this concept by requiring a three-fourths rather than a two-thirds vote of the members for any sentence to confinement in excess of ten years. Art. 52(b)(2), 10 U.S.C. Section 852(b)(2). The Court of Military Appeals has recognized this concept as it relates to cases wherein confinement for life is adjudged. In such cases, it routinely granted review, even though no issues are presented, apparently so as to assure petitioner access to Supreme Court review. E.g., United States v. Gooch, 23 M.J. 63 (C.M.A. 1986) (no issues presented in life sentence case); United States v. Delacruz, 23 M.J. 356 (1987) pet. denied, 107 S.Ct. 2187 (1987) (life sentence case wherein issue was Sixth Amendment entitlement to a jury).

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Ake v. Oklahoma, 470 U.S. at 77.

The petitioner's private interest in the accuracy of the findings at trial, which placed his life and liberty at risk, is "almost uniquely compelling." Ake v. Oklahoma, 470 U.S. at 78. Such an interest weighs heavily in the balancing analysis. Id.

To weigh the second and third factors, it must be determined what additional or substitute procedural safeguards it is that petitioner seeks. It is clear that, at trial, the petitioner sought a forum which would

produce an accurate result. Arguing that the members were less likely to render accurate findings because they were personally selected by the convening authority and were each willing to adjudge the death penalty, petitioner sought a random selection of new members and three peremptory challenges. Neither remedy is currently provided in military law.

More significantly, the petitioner sought a court-martial of at least six members. He relied, inter alia, on the Sixth and Fourteenth Amendment holdings in Ballew v. Georgia, 435 U.S. 223 (1978) and Burch v. Louisiana, 441 U.S. 130 (1979), that five person and nonunanimous six person juries may not constitutionally convict a defendant for a nonpetty offense. He also relied on the Due Process Clause and the holdings of Ballew

and Burch to the extent they are predicated upon due process concerns as well as Sixth Amendment considerations (R. 438). Before this Court, the petitioner eschews any reliance on the Sixth Amendment but suggests that a nonunanimous factfinding body of only five persons, produces results so unreliable, as a matter of law, that the Due Process Clause is violated.[3]

C. Minimum Due Process Requires an Unanimous Verdict of at Least Six Members.

A factfinding body of only five people, whether civilian or military,

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3. Petitioner is aware that had six members entered findings rather than five, the two-thirds rule would have required the concurrence of only four of the six members. Therefore, by the due process implications of Ballew and Burch, petitioner's request for six members included a request that the finding of the six members be unanimous.

produces results so unreliable, as a matter of law, that the Due Process Clause is violated. This court reached that conclusion in Ballew based upon empirical data compiled after its decision in Williams v. Florida, 399 U.S. 78 (1970) upholding the use of a six person jury. Ballew v. Georgia, 435 U.S. at 239. Relying on this data, the Court reached specific findings that: "progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate factfinding ..."; "the risk of convicting an innocent person ... rises as the size of the jury diminishes"; "the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and ... the variance amounts to an imbalance to the detriment of one side, the defense"; "the presence of minority

viewpoints [diminishes] as juries decrease in size ... "; and "[w]hen the case is close, and the guilt or innocence of the defendant is not readily apparent [larger juries] will ensure accurate factfinding." Ballew v. Georgia, 435 U.S. at 232-38. The evidence indicates that as the size of juries diminishes to five and below, the risk of conviction of innocent defendants increases. Id., at 234-35. Unanimity of five-person juries does not remedy the Sixth Amendment infirmities. Id. at 241. Savings in time and money do not justify the State's interest in five-person juries. Id., at 243-44.

The Court relied on the same rationale in Burch. "[M]uch the same reasons that led us in Ballew to decide that use of a five-member jury threatened

the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantees and justifies our requiring verdicts rendered by six-person juries to be unanimous." Burch v. Louisiana, 441 U.S. at 138 (1979). Once again, the Court rejected the State's justification that the use of nonunanimous six-person juries saved time and money. Id., at 139. If a vote of five members of a six person jury presented a threat to due process, certainly a vote of 4-1 presents a greater threat to the same jury trial guarantees.

D. Due Process in this Case Required at Least an Unanimous Six Member Verdict.

The military judge in petitioner's case articulated a justification different than those the State advanced in Ballew and Burch for his refusal to order trial with six members.

> "The defense motion to disqualify the Court in that it is less than six members is denied. Specifically, Article 16 requires only that there be five members, that's a statutory requirement and I note that the UCMJ has been amended by Congress since the Ballew case but Congress has not deemed it appropriate to amend that jurisdictional requirement and that, I believe, is the area where it will have to come from rather than the court dictating. Also, I note that the military cases dealing with the Ballew decision have all said it is inapplicable. Therefore, that motion is denied."

(R. 440).

While that ruling appears sound, it ignores the specific language of Article

16, UCMJ - the basis for due process in military courts - petitioner's general request for a factfinder which would produce accurate results, and expert opinion that the empirical data relied on in Ballew is applicable to courts-martial members.

First, the jurisdictional requirement of Article 16, UCMJ, is for "not less than five members." Nothing in that language evidences a Congressional intent that there never be more than five members assembled as a general court-martial. Therefore, the statute in no way prohibited the military judge, in his discretion, from ordering the detail of additional members to assure accurate factfinding in this case where petitioner might forfeit either his life or his liberty for the balance of his life.

Second, the provisions of the UCMJ do

not alone define due process for courts-martial.

> "Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we cannot give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes."

United States v. Clay, 1 C.M.R. 74, 77 (C.M.A. 1951). Accordingly, even though petitioner may have no Sixth Amendment entitlement to trial by jury, the requisites of due process for civilian trials give meaning to the process due peti-

tioner. Moreover, the Due Process Clause applies to court-martial procedure. Burns v. Wilson, 346 U.S. 137, 142-43 (1953) ("For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers - as well as civilians -- from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil court") (emphasis added). He who urges a different rule than the one prevailing in the civilian community bears the burden of demonstrating that military conditions require the rule. Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976).

Third, the military judge denied petitioner's motion for a six-member court after having also denied petitioner's motions for random selection of the members, disqualification of "death-qualified" members more prone to convict, and the exercise of three peremptory challenges. It was apparent petitioner was seeking evaluation of the facts by that sense of the community which will tend to ensure accurate fact-finding. See Ballew v. Georgia, 435 U.S. at 238. Unanimity is required in six-person juries to ensure that a sense of the community stands between the zealous prosecutor or biased judge. Burch v. Louisiana, 441 U.S. at 135-37. Verdicts based on 10-2, 9-3, and 6-0 votes serve this insulation function. Apodoca v. Oregon, 406 U.S. at 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). Those

based on 4-1 or 4-2 votes do not. Burch v. Louisiana, 441 U.S. at 135-37. A general court-martial composed of the five senior field grade and senior noncommissioned officers personally selected by the convening authority and remaining after challenges would more likely represent command interests than protect petitioner from such interests. See United States v. McClain, 22 M.J. 124. Though Article 25, UCMJ, allowed the convening authority to select those members who became the factfinders, the absence of more junior officers and lower-ranking enlisted soldiers removed from deliberation on findings the sense of community such soldiers would have brought to bear. The military judge's refusal to require additional members or allow additional challenges ignored this concern.

Finally, there exists no military exigency that justifies the refusal of military courts to consider and follow the studies and data considered by the Court in Burch and Ballew. One of the primary experts in the field of juries and small group interactions relied upon by the Court in Burch and Ballew disagrees with the lower court's early conclusion that those empirical studies are inapposite in light of the composition and function of court-martial members. See United States v. Guilford, 8 M.J. 598, 601-02 (A.C.M.R. 1979), pet. denied, 8 M.J. 242 (C.M.A. 1980). Professor Michael J. Saks provided the Ballew and Burch courts with a significant portion of the empirical data upon which they relied. See Ballew v. Georgia, 435 U.S. at 231 n. 10. He has opined that "the same principles (of

group decision-making adverted to in Ballew) would apply to military as to civilian decision-makers" (Appendix C). He bases his opinion on studies indicating that social psychological phenomena among military personnel are the same as those among civilians; on the documented conclusion that the demographic characteristics of group members bear little or no relation to the performance of the group's task; that the ability of a group to provide cross-sectional representation of a community depends upon statistics, i.e., the size of the group; and that in other areas of research, only negligible or no differences have been found between civilian and military populations (Id.). Professor Saks' opinion provides the insight other courts have sought in order to determine whether the empirical studies

cited in Ballew and Burch are applicable to courts-martial members. E.g., Mendrano v. Smith, 797 F.2d 1538, 1545-46 (10th Cir. 1986).

The Army Court has explained why it views the Ballew and Burch data inapposite.

> "It cannot be gainsaid that the military trial must be fair and impartial. See e.g., United States v. Lamela, supra, 7 M.J. at 278; United States v. Cleveland, 6 M.J. 939, 942 (A.C.M.R. 1979). The trial is, however, by a unique, military tribunal that is essentially different from the jury envisioned by the Sixth Amendment. The composition of courts-martial is different, as the members are drawn exclusively from the accused's own profession based on specified qualifications (one of which is judicial temperament), with specialized knowledge of the profession, and subject to only one challenge other than for cause. Their functioning differs, too. For example, it includes the questioning of witnesses and the determining of sentences. In view of such compositional

> and functional differences, the studies relied upon in Ballew and Burch are inapposite. United States v. Wolff, supra, 5 M.J. at 925. The differences between the institution of courts-martial and the institution known as a jury have been recognized as necessary as well as constitutional. O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969). When the use of courts-martial has impinged on constitutional rights, the remedy has been to limit the exercise of their jurisdiction rather than to alter the nature of the tribunal, for courts-martial are not fundamentally unfair. Gosa v. Mayden, 413 U.S. 665, 93 S.Ct. 2926, 27 L.Ed.2d 873 (1973).4

United States v. Guilford, 8 M.J. at 602.

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4. Thus, the overruling of O'Callahan and the expansion of court-martial jurisdiction over all crimes committed by soldiers provides compelling reasons to provide at least some courts-martial accused due process protections similar to those provided civilian defendants, absent a compelling military necessity. See Solorio v. United States, 107 S.Ct. 2924 (1987).

Petitioner suggests that the claimed specialized knowledge - arising out of their military status - which the members brought to bear in the factfinding process in petitioner's case was of little relevance. Petitioner was tried for the common law crime of premeditated murder. The only issue in dispute was the element of premeditation. Though the dynamics of the military community helped explain the relationship between petitioner and his victim, the members would have understood those dynamics even without their professional knowledge or qualifications.

The fact the members were "subject to only one challenge other than for cause" is a factor which supports rather than denigrates petitioner's position that additional members should have been detailed. That the members also

determined petitioner's sentence appears irrelevant to the issue whether they, only five in number, could render an accurate finding of fact.

The size of a five-member court-martial nevertheless alone renders group deliberation less effective; the risk of an erroneous conviction is still greater by virtue of the small size of the group; the variance in results still amounts to an imbalance to the detriment of the defense solely as a result of the group's small size; five members nevertheless fail to adequately represent minority viewpoints, especially when junior members, from whom minority viewpoints are more likely to come, are excluded; and in close cases, five members nevertheless fail to provide the requisite sense of the community necessary to produce reliable results,

particularly where, as here, the five members represent only part of the military community.

The petitioner sought and was denied the safeguards inherent in the assembling of at least six members and a requirement that the finding of a six member court-martial be unanimous. The probable value of the assembling of six members is more effective group deliberation; less risk of an erroneous conviction; lessening of the imbalance in variance of findings as the factfinding body becomes smaller; the greater the presence of minority viewpoints in the deliberation room; and insulation of petitioner from a zealous prosecutor, biased judge, or intemperate convening authority through a broader sense of the military community. A requirement of unanimity has the probable value of producing more accurate

findings, as both Congress and the President have acknowledged by their requirements of unanimity in capital cases.

Petitioner does not necessarily seek a requirement of unanimity of five and six members in all cases, but only in those cases where confinement for life is mandatory.[5] The individual interest in such cases is so significant that no accused should be deprived of it upon

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5. Though the petitioner in United States v. Dodson, 21 M.J. 237 (C.M.A.), petition for reconsideration denied, 22 M.J. 257 (C.M.A.), cert. denied, 107 S.Ct. 644 (1986) presented the issue whether a two-thirds vote on findings may sustain a mandatory life sentence, five of seven members voted for a finding of premeditated murder in his case. See 55 U.S.L.W. 3373-74. Therefore, his Petition did not present the same concerns about a minimum number of six members and unanimity as petitioner presents with regard to the 4-1 vote on findings in his case.

findings which may be erroneous. There is a fair risk that an accused may be erroneously deprived of his liberty for the remainder of his natural life, as was petitioner, unless the procedural safeguards of the assembling of six members and the requirement of unanimity are provided.

Government interests are not adversely affected if these safeguards are provided. First, the government shares the compelling interest of all military accused in producing accurate findings. Ake v. Oklahoma, 470 U.S. at 79. The government has no interest in the mandatory imposition of a sentence to life confinement against accused who have not committed a premeditated or felony murder. Second, the detail of members in premeditated and felony murder cases of sufficient members to ensure the assembly

of at least six members burdens the government little in terms of time or money. The assembly of six or more members is a common occurrence in courts-martial practice. The burden of assembling six members rather than five is not significant even in times of war when weighed against the significant liberty interest at stake.[6]

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6. The only offense for which the death penalty is mandatory is the offense of spying in wartime. Art. 106 UCMJ, 10 U.S.C. Section 906. Accordingly, findings of guilty to such an offense must be unanimous. Art. 52(a)(1), 10 U.S.C. Section 852(a)(1). Though an unanimous five-member court could enter a finding of guilty to such an offense, it is likely, in light of the number of members usually detailed for general courts-martial, that more than five members would assemble as the court. Thus, even the event of war does not necessarily negate the need for unanimity of findings nor the likelihood of at least six members assembling as the court.

Last, the safeguards petitioner seeks are only for cases of premeditated or felony murder and do not necessitate retrials. In cases, as here, where mens rea and not actus rea is in dispute, the requirement of unanimity in findings would produce a finding to that offense to which all the members voted for a finding of guilty. Unable to reach an unanimous finding of premeditation, the members here would have entered a finding to either unpremeditated murder or voluntary manslaughter, the lesser-included offenses the military judge instructed them to consider. See Art. 51(c)(3), UCMJ, 10 U.S.C. Section 851(c)(3). Both the government and petitioner would thus be assured of the accuracy of such an unanimous finding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, Appellee	)	USCMA Dkt. No. 60613/AR
	)	CMR Dkt.
v.	)	No. 449157
	)	
Tony J. VIOLA (150-68-2575), Appellant	)	O R D E R

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, we conclude that there is sufficient evidence to sustain the findings of guilty to premeditated murder. See generally Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); United States v. Harper, 22 M.J. 157 (C.M.A. 1986). We are further satisfied that the issues raised by appellate defense counsel are without merit.

Accordingly, it is by the Court, this 1st day of December, 1988

ORDERED:

That said petition is hereby granted on the issues raised by appellate defense counsel; and

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the
Court

cc:

The Judge Advocate General of the Army
Appellate Defense Counsel (BOGUCKI Esq.)
Appellate Government Counsel (HAUSKEN)

APPENDIX B

CORRECTED COPY

UNITED STATES ARMY COURT
OF MILITARY REVIEW

Before
DeFORD, KANE, and KENNETT
Appellate Military Judges

UNITED STATES, Appellee	)	CM449157
v.	)	2d Infantry Division
Private First Class TONY J. VIOLA, 150-68-2575, United States Army, Appellant	)	A.J. Chwalibog, Military Judge

For Appellant: Captain Richard J. Anderson, JAGC (argued); Robert H. Bogucki, Esquire* (on brief)

For Appellee: Captain Patrick A. Hewitt, JAGC (argued); Colonel Norman G. Cooper, JAGC, Major Byron J. Braun, JAGC, Captain Gary L. Hausken, JAGC (on brief)

29 June 1988

OPINION OF THE COURT

KANE, Judge:

Appellant was tried by a general

* Corrected

court-martial composed of officer and enlisted members. Contrary to his plea, appellant was convicted of premeditated murder, a violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. Section 918 (1982). The convening authority approved his sentence to a dishonorable discharge, life imprisonment, total forfeitures and reduction to the grade of Private E-1.

I

Statement of Facts

On 2 March 1986, the appellant and his victim, Corporal (CPL) Jon R. Watson, both members of the same platoon, were on a command sponsored excursion to the Dragon Valley Ski Resort in Yong Pyong, Korea. The members stayed at a "hostel,"* a building apart from the main hotel at the resort. In the evening

following the day's recreational activities, members of the platoon gathered at the hostel and engaged in a number of leisure activities during which alcoholic beverages were imbibed. Both CPL Watson and appellant became somewhat intoxicated, CPL Watson much more so than appellant. At approximately 2230 hours, four members of the platoon decided to go to the "Disco" which was located across the street from the main hotel of the resort. Appellant and CPL Watson were among this group.

Proceeding to the "Disco" on foot, the appellant and CPL Watson trailed the other two at some distance. CPL Watson's gait at this point of the evening reflected a state of extreme intoxication. Arriving at the "Disco", the lead pair discovered that the nightclub had closed for the night and decided that

they would go across the street to the bar in the hotel. As they turned, the appellant and CPL Watson approached. Appellant and CPL Watson were told that the "Disco" was closed and that the lead soldiers were going to the other bar. This was the last time that CPL Watson was seen alive by anyone other than the appellant.

On the morning of 3 March 1988, the body of CPL Watson was discovered along the side of one of the hotel's external walls some distance from the "Disco" and the bar. The button of the victim's pants was unfastened and his zipper was open. His gloves were found on the ground. There were a number of young trees in the area which were supported by lengths of wood measuring approximately two inches by two inches by six feet. One of these lengths of wood was found

approximately sixty feet from the body spattered with the victim's blood.

The autopsy report by a forensic pathologist found that CPL Watson had died of multiple head wounds. Specifically, he found that CPL Watson had suffered a minimum of three blows to the head delivered by a blunt instrument; the testimony of this expert indicated that the victim may have suffered as many as seven or eight blows to the head. The pathologist also found blunt force injuries to the right wrist and hand. There were also abrasions of indeterminate origin on the neck and left abdomen.

At trial, the appellant admitted that he had killed CPL Watson, but contended that his act was not premeditated. Rather, he asserted that the killing was committed in rage. According to the appellant, CPL Watson and he had been

walking back to the hostel after leaving the "Disco" when two Korean nationals saw them and laughed at their drunkenness. CPL Watson wanted to fight the Koreans for laughing at them. To avoid any trouble, the appellant physically prevented and verbally dissuaded CPL Watson from fighting with the Koreans. According to the appellant, CPL Watson then redirected his combative inclinations from the Koreans towards him. He testified that CPL Watson had kicked him in the groin and then pushed him to the ground. CPL Watson then kicked appellant repeatedly while challenging him to get up and fight. Appellant testified that he retreated but that CPL Watson pursued him swinging his fists. The two then became embroiled in a fist fight during which the appellant picked up the length of wood and killed CPL Watson.

Other evidence at trial created a different picture. One witness testified that the appellant had told him that he had struck CPL Watson with the length of wood while CPL Watson was urinating. Another witness indicated that the appellant did not exhibit any signs of having been in a fight. There was also evidence that appellant had contrived to conceal certain aspects of his crime by removing and hiding the victim's wallet and by placing the length of wood against one of the trees some distance from the body.

Following the murder, the appellant returned to the hostel and told a fellow soldier that he thought that he had killed CPL Watson. The appellant then retired for the night.

II

Appellant alleges several errors which warrant discussion. The first

challenges a number of evidentiary rulings of the military judge which denied appellant's request for attendance of a witness who would testify about appellant's character for impulsivity and low tolerance of frustration and which held inadmissible evidence of the victim's alleged propensity for "belligerence" or "pugnacity".

A

At trial, appellant requested the presence of Captain C, a military psychologist, to testify as to the appellant's "below average" ability to plan ahead, anticipate consequences, and to use social judgment. The appellant asserted that this character evidence of "subaverage anticipation of consequences" would "make a fact of consequence whether [appellant] had a motive to kill and formed a premeditated intent to kill ...

less probable than it would be without evidence of the trait." The appellant also argued that his character traits of "impulsivity and low frustration tolerance" and of acting out his frustrations could lead the panel to conclude that the appellant had not premeditated the murder because he had not "developed socially in knowledge of judgment and his actions." The appellant was offering the psychologist's testimony to establish the existence of these character traits. The psychologist was not, however, offered as an expert.

Appellant's offer of proof suggested that he would have the members infer from the mere existence of these traits that the appellant did not premeditate the murder. The appellant did not indicate that the psychologist would be qualified as an expert to testify that one posses-

sing such characteristics would be more or less unlikely to have premeditated the crime of murder. The military judge denied the defense motion to compel the attendance of the witness, finding that there was no relevant character trait within the meaning of Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 404(b)[hereinafter Mil. R. Evid.], and that the proffered evidence did not raise the defense of partial mental responsibility under Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(c) [hereinafter R.C.M.].

The appellant later called another psychiatric expert who testified that an impulsive person would be less likely to consider the consequences of his actions before acting. Based on this testimony, the military judge correctly found the

character trait of impulsivity to be relevant. Cf. Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (evidence of inability to form requisite intent due to sleep deprivation and other pressures was fully admissible). At appellant's request, the military judge admitted a redacted version of the report of Captain C. The appellant did not renew his request for the attendance of Captain C. The appellant now contends that the military judge erred by "forcing" him to present this evidence by means of inadequate substitute for the live witness. We find that the military judge did not abuse his discretion when he denied Appellant's motion to secure the attendance of the witness.

An accused has a constitutional right to present in his defense evidence which is material and favorable. United

States v. Valenzuela-Bernal, 458 U.S. 858 (1982). See, e.g., Rock v. Arkansas, 107 S.Ct. 2704 (1987) (accused had a right to present relevant testimony from her hypnotically refreshed memory despite evidentiary bar to such evidence). This right does not, however, require the admission of all "evidence" proffered by an accused without regard for the evidentiary requirements of our adversarial system. Taylor v. Illinois, 108 S.Ct. 896 (1988). The right encompasses only that evidence which "might influence the determination of guilt". Pennsylvania v. Ritchie, 107 S.Ct. 989, 1001 (1987). See Mil R.Evid. 401. Thus, this right is subject to the limitation that the proffered evidence be relevant. United States v. Valenzuela-Bernal, 458 U.S. at 867 (the Sixth Amendment does not guarantee the right to secure the

attendance of any and all witnesses, only the production of witnesses whose testimony is relevant and necessary).

Character evidence may be probative of a lack of premeditation. Cf. United States v. Klein, 20 M.J. 26 (C.M.A. 1985), cert. denied, 106 S.Ct. 534. However, character evidence has probative value only when directed to an issue or matter in dispute with a legitimate tendency to prove the allegations of the party offering it. See United States v. Elliott, 23 M.J. 1 (C.M.A. 1986). At the time the military judge ruled on the motion to produce the psychologist, the appellant's offer of proof identified the issue in dispute but failed to inform the military judge of the theory of the case and the allegation of fact the appellant intended to prove. There was no offer of proof of record that the alleged

character traits were operative on the night of the murder or that the character traits proved a lack of ability to premeditate appellant's crime. Appellant simply indicated a desire to prove the existence of character traits and to have the members conclude that the appellant acted in conformity therewith.

In this case, the evidence for which the appellant sought admission was specifically barred by the rules of evidence. Mil. R. Evid. 404 precludes admission of evidence of character traits to prove that the person acted in conformity therewith on a particular occasion unless the character trait is "pertinent" or, in other words, relevant. This general rule of inadmissibility conforms to the constitutional requirements established by the United States Supreme Court: a character trait cannot

be material unless it is pertinent.

Having failed to demonstrate the relevance of the requested witness' testimony, the appellant was not entitled to production of the witness. R.C.M. 703(b). Thus, the ruling of the military judge did not violate the constitutionally grounded mandate of Valenzuela-Bernal or appellant's constitutional right to present witnesses in his defense.

Subsequent to this ruling, the appellant offered the expert opinion of a psychiatrist in order to establish adequate foundation for the admission of the report of Captain C. This report included Captain C's psychological findings concerning the character traits of the appellant. This foundation was adequate for admission of evidence of character traits contained in the report.

The appellant could have reasserted his demand for the attendance of this witness at this time; however, he failed to request reconsideration of the military judge's earlier ruling in light of his now perfected offer of proof. A military judge has no duty to sua sponte reconsider an earlier ruling absent an affirmative request by counsel. See United States v. Welch, 25 M.J. 23 (C.M.A. 1987) (the military judge's error in excluding evidence was not prejudicial where the accused withdrew his offer when the military judge offered to reconsider his earlier ruling). See also United States v. DiCupe, 21 M.J. 440, 444 (C.M.A. 1986) (the court found no abuse of discretion by the military judge in admitting evidence where there was no request for a ruling by the accused).

Accordingly, we find no abuse of discretion by the military judge. At the time the military judge denied the appellant's request for this witness, the defective offer of proof was insufficient to overcome the general prohibition against character evidence set forth in Mil. R. Evid. 404 or to establish the minimal relevance necessary to trigger the constitutional safguards of Valenzuela-Bernal. At the time the appellant perfected his offer of proof under both Valenzuela-Bernal and Mil. R. Evid. 404(b), he failed to request reconsideration of his earlier request for the attendance of the witness. The appellant was in no way "forced" to resort to the documentary substitute for the live testimony of the witness; rather, he elected to proceed with the documentary substitute.

B

The appellant also assigns as error the ruling of the military judge excluding evidence of the victim's purported character for "belligerence" and "pugnacity". At trial, the appellant offered evidence that the victim was ill-tempered, hostile, aggressive, argumentative, obnoxious and belligerent. The appellant offered this evidence on the theory that the victim provoked others by "pushing" them until they reacted. The military judge properly ruled that he would permit evidence of the victim's character for violence or willingness to fight. However, he declined to permit the appellant to elicit testimony that the character of the victim was such that he may have provoked the fight. The military judge ruled that character evidence demonstrating the victim's

propensity for violence or "pugnacity" was properly relevant; he found that evidence demonstrating the victim's propensity for "belligerence" was not relevant.

Testing for abuse of discretion, this court must identify the issue or matter in dispute and the allegations which the party offering it intends to prove. United States v. Elliot, supra. Appellant sought admission of the victim's character for belligerence premised on the theory that the murder was committed in an uncontrollable rage which spontaneously erupted as the result of continuous and repeated abuses occasioned by the victim's belligerent character.

However, prior to offering evidence of the victim's propensity for belligerence, the appellant had testified that the victim had been the aggressor and

that a murder was committed in the heat of passion arising from a physical altercation between the two men. Thus, the appellant did not attribute his actions to the victim's habitual belligerence but to the circumstances surrounding the murder. Moreover, there was no other evidence offered which would support this alternate theory. Consequently, the relevance of this evidence to the offense charged is tangential at best.

Nevertheless, appellant is entitled to proceed on alternate and even contradictory theories in conducting his defense. Notwithstanding appellant's inconsistent testimony, his theory attempts to persuade the finder of fact that the murder was not premeditated but was a spontaneous reaction to provocative actions by the victim which occurred over a period of time. The military judge

found a distinction between character for belligerence and character for pugnacity, a distinction which escapes this court and Webster's Third New International Dictionary (1981). Therefore, we will test for prejudice and apply the test set forth in United States v. Weeks, 20 M.J. 22 (C.M.A. 1985).

Applying the test set forth in United States v. Weeks, we find that the government's case for premeditation was not strong and conclusive, but was only circumstantial. However, we also find that the defense's theory of the case is implausible. The appellant's own testimony belied any inference that the murder was committed as the result of some pent up rage engendered by the victim's abrasive character; rather, his testimony indicated that the murder was committed in a moment's heat of passion. Moreover,

much of the excluded testimony was not material to the victim's alleged abusiveness towards the appellant but would have only recounted the victim's purported "belligerence" towards others in general. The excluded testimony included but a single instance where the witness saw the victim get so mad with the appellant that he turned red in the face. Finally, from the appellant's own testimony and the testimony of other witnesses, we find more than adequate substitute for the evidence excluded by the trial judge. Accordingly, if there was an abuse of discretion in excluding evidence of the victim's character, the appellant was not prejudiced. Article 59(a), UCMJ.

III

The appellant also asserts that his trial was tainted by impermissible

command influence. During the trial, a First Lieutenant C, the platoon leader of several of the witnesses, returned to the witness room after testifying and made a number of statements. This reaction was a spontaneous response to a rather searching and thorough cross-examination by the defense counsel. The appellant now contends that these statements constitute prejudicial unlawful command influence.

The incident was immediately brought to the attention of the military judge who conducted a contempt hearing during which the nature and impact of the statements were tested by direct and cross-examination. As required by United States v. Karlson, the appellant and his counsel had opportunity to examine the witnesses and First Lieutenant C. See

United States v. Karlson, 16 M.J. 469 (C.M.A. 1983).

Applying the standard of review mandated by United States v. Thomas, the evidence of record demonstrates beyond reasonable doubt that appellant's court-martial was not influenced by any of these remarks. See United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), cert. denied, 107 S.Ct. 1289 (1987). Nor does the conduct of First Lieutenant C constitute such a flouting of the United States Constitution and the Uniform Code of Military Justice that the drastic remedy of dismissal is warranted. Cf. United States v. Levite, 25 M.J. 334 (C.M.A. 1987). Accordingly, we find this assignment of error to be without merit.

IV

Appellant also contends that the evidence is insufficient to sustain a

conviction for premeditated murder. He argues that there is insufficient evidence of record from which to infer the element of premeditation.

In order to sustain a conviction of premeditated murder, the government must prove beyond a reasonable doubt that the accused committed murder with a premeditated design to kill. See Manual for Courts-Martial, United States, 1984 [hereinafter M.C.M.], para. 43b(1). The element of premeditated design includes both a specific intent to kill and consideration of the act intended. M.C.M., para. 43c(2)(a). Intent to kill alone is insufficient to sustain a conviction for premeditated murder. See W. LaFave and A. Scott, Criminal Law, Section 73 (1972). See also F. Bailey and H. Rothblatt, Crimes of Violence: Assault and Homicide, Section 550 (1973), and C.

Torcia, Wharton's Criminal Law (14th ed.), Section 140 (1979). To sustain such a conviction, the killing must have been committed after reflection by a cool mind. Id. Because such reflection or deliberation is a subjective state of mind, the finder of fact must often resort to circumstantial evidence of premeditation. LaFave and Scott's treatise on the subject finds three categories of evidence useful in resolving the question of premeditation. Id. These categories include evidence of planning activity, evidence of motive, and evidence of the nature of the killing. Id.

Prior to the date of the murder, the appellant bore considerable animosity for his victim, CPL Watson. The appellant resented his victim's abrasive and, at times, abusive style of leadership. The

appellant fostered such a deep and abiding ill will towards his victim that he planned and took significant steps towards assaulting the victim on several occasions. On 2 March 1987, the appellant and his victim departed the hostel at approximately 2330 hours and walked to the "Disco". According to all the witnesses and to the appellant himself, their relations at that time were amicable and convivial. We specifically find that both were somewhat intoxicated, the victim more so than the appellant.

We will not speculate on what course of action the two decided upon on finding the "Disco" closed for the evening. However, it is clear that, before implementing those plans, the victim apparently decided to walk to a more secluded spot some distance from the entrance to the main hotel in order to

relieve himself. We can infer that the victim told the appellant of his intentions; the appellant accompanied the victim during this momentary deviation. We infer these facts from the physical evidence at the crime scene and from the admissions of the appellant. These facts, together with the accounts of the appellant's physical appearance following the murder (which revealed no signs of his having been in any sort of fight) and the victim's state of extreme intoxication, belie the appellant's rendition of the events of that night. Consequently, we find that the appellant's attack was not provoked by any physical aggression by the victim. Nor do we find that the attack was verbally provoked. While there was some evidence of the victim's abrasive personality in general, there is no evidence of record which would justify

an inference that the victim was verbally abusive on the night in question. Quite the contrary, the relations between the victim and the appellant appear to have been congenial.

The appellant seized upon the opportunity presented by the relative isolation of the area at that time of night and the victim's relatively defenseless state caused by his intoxication and state of undress. The appellant took the length of wood and struck the victim as he prepared to relieve himself at the curb of the street outside the building. The victim, caught unawares, attempted to ward off subsequent blows as evidenced by the defensive wounds on his hand. The victim reeled from the assault and retreated to a position alongside the wall of the building. There he fell to the ground and lay on his back, his pants

still unzipped. The appellant continued his attack which was ultimately lethal.

The nature of the attack as evidenced by the forensic examination of the body indicate that the blows were calculated to kill and not merely to wound. All of the blows were concentrated about the head and neck. The only other marks on the body consisted of defensive wounds on the hand of the victim and a single abrasion on the abdomen.

Following the death of the victim, the appellant attempted to conceal the evidence of his crime by leaving a "false clue" for the investigation he knew would follow. He removed the victim's wallet and concealed it intending that the investigators conclude that the murder was committed during the course of a robbery. He also removed the murder weapon to a point approximately sixty

feet from the body to further frustrate the investigation. Both of these acts were deliberate and calculated.

From these facts and inferences we find more than adequate evidence of the appellant's premeditated design to commit murder. "Premeditation" does not necessarily connote planning nor does it contemplate that the intent to kill be entertained for any period of time. M.C.M., para. 43c(2)(a). As we have noted above, premeditation only requires a cool mind to reflect on his intent to kill before committing the lethal act. The facts and inferences detailed above, including the lack of provocation, the disadvantage of the victim, and the nature, extent, and duration of the attack, demonstrate beyond reasonable doubt that the appellant intended to kill, considered the means, opportunity,

and chances for success, and proceeded to carry out his design in a methodical and deliberate manner.

V

Finally, the appellant argues that court-martial findings by a non-unanimous panel of five members selected by the convening authority did not satisfy the constitutional requirements of due process. Similar challenges to the constitutionality of the findings of courts-martial have been repeatedly rejected. United States v. Guilford, 8 M.J. 242 (C.M.A. 1979). See also United States v. Brown, 13 M.J. 381 (C.M.A. 1982) (summary affirmance).

We have considered the other assignments of error, including appellant's sentence appropriateness argument, and find them to be without merit. The

findings of guilty and sentence are affirmed.

Senior Judge DeFORD and Judge KENNETT* concur.

FOR THE COURT:
/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

*Corrected

APPENDIX C

From: Michael J. Saks, Ph.D., Department of Psychology, Boston College, Chestnut Hill, Massachusetts 02167

To: Captain Richard J. Anderson, Defense Appellate Division, U.S. Army Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041

Subj: Size of judicial decision-making body in military trials

Ref:

(a) Hare, A.P., Handbook of Small Group Research. New York: Free Press (1976).

(b) Havron, M.D., et al., The Effectiveness of Small Military Units. Washington, D.C.: The Adjutant General's Office, Personnel Research Section (1952)(PRS Rep. 980)

(c) McGrath, J.E. and Altman, I., Small Group Research. New York: Holt (1966).

(d) Saks, M.J., The Limits of Scientific Jury Selection: Ethical and Empirical, 17 Jurimetrics Journal 3022 (1976).

(e) Saks, M.J., Jury Verdicts. Lexington, MA: D.C. Heath (1977).

(f) Saks, M.J., and Hastie, R., Social Psychology in Court. New York: Van Nostrand Reinhold (1978).

(g) Stouffer et al., The American Soldier. (Part of series, Studies in social psychology in World War II). Princeton, N.J.: Princeton University Press (1949).

(h) Zeisel, H., " ... And then there were none:" The Diminution of the Federal Jury. 38 U.Ch.L.Rev. 710-724 (1971).

(i) Figure 1 (attached).

1. As I understand the issue, it is that the research findings on group decision-making as a function of group size which were adverted to by the U.S. Supreme Court in Ballew v. Georgia are thought by some not to apply to military populations. To my knowledge, none of the studies that have been conducted on the question employed military populations. I think, however, that in the

absence of such direct studies, the most defensible conclusion is that the same principles would apply to military as to civilian decision-makers. In the paragraphs below I present the general rationale and evidence that lead me to believe this. Let me apologize in advance for any misstatements I might make regarding particulars of procedures in military courts, with which I am unfamiliar. My expertise goes only to the effects of size on group behavior.

a. In the 1940's and 50's a substantial portion of social psychological research on small group behavior was done in, by and for the military. Summaries of much of this work may be found in Hare (1976), McGrath and Altman (1966), and the famous series by Stouffer et al. (1949) on The American Soldier.

Virtually all of the social psychological phenomena observed among civilians - including principles of attitude change, group influence, leadership, and decision-making - were found to hold among military personnel as well. In particular, it has been repeatedly found, contrary to popular belief, that the composition of a group (that is, the age, education, and other demographic characteristics of group members) bear little or, usually, no relation to the performance of the group's task (e.g., McGrath and Altman, 1966, p. 106-107; Havron et al., 1952; Saks, 1976; Saks and Hastie, 1978). (What can make a difference are specific technical skills required by the task; in the jury situation this is rarely a problem).

b. Most of the variables of interest to the Court in Ballew are especially

unlikely to behave differently with the use of different populations. Some are strictly statistical phenomena, where it matters not whether the group members are military, civilian, or even whether they are people. That is, the ability of groups of varying sizes to provide cross-sectional representation of the community from which they are drawn depends only upon the distribution of objects (people, marbles, cars, anything) in the population and the size of the sample. Similarly, one of the major virtues of a group over individuals is its ability to bring together diverse intellectual and experiential resources. That ability grows with the group's size (although with each additional member each incremental improvement is less than the one that preceded it). Further, there is no obvious reason to think that if larger

groups lend themselves to greater resistance of group members to conformity pressures by the majority or promote group deliberation, the population from which the group is drawn will alter these general phenomena_ (see Zeisel, 1971; Saks, 1977).

c. To say simply that one population is different from another and therefore the findings from one do not generalize to the other is a misleading oversimplification. If a functional relationship is found among population A between size and, say rate of conviction, even a finding that population B convicts at a different rate than population A does not negate the functional relationship. Only "interactions" of particular sorts could do that. This is illustrated in Figure 1a, where the two different populations show a difference in conviction rates,

but their pattern of response to jury size changes is the same. The suggestion that the findings from one population do not apply to another really implies the relationships shown in Figures 1b and 1c. Here, the relation between size and convictions found in population A either does not hold for population B or is reversed. Without evidence we cannot be certain, but that such a "statistical interaction" obtains in the switch from civilian to military populations seems highly unlikely.

d. In trying to think of some differences that may exist among military populations that could produce such differences, two possibilities occur to me. One is the hierarchial relationship that exists among military personnel. The second is the existence of a likelihood of future interaction among "jury"

members. It may be, for example, that due to the influence of higher ranking members, other members of the decision-making body play no independent role, and in essence rubber stamp the preference of the highest authority. I have no way of knowing if this is the case, but it would make the size of the body far less important. This difference is not one of demographics of the military population, but the social structure within which they operate. The suggestion in this paragraph is highly speculative. The point of making it is chiefly to indicate that those who think the difference in populations makes a difference ought to specify just what they believe to be the critical element(s), and offer evidence that take us beyond speculation.

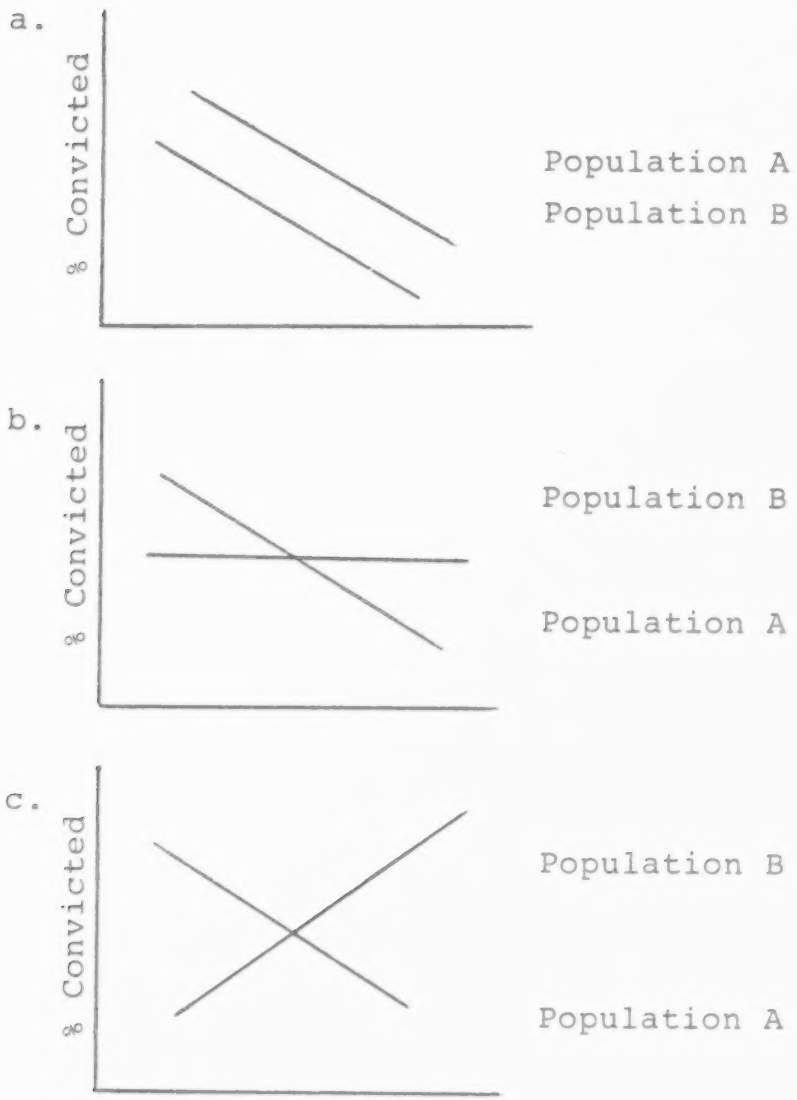
2. In summary, while I am aware of no direct tests of the question at hand

that have been conducted on military populations, it is highly unlikely that that would be a difference that makes any difference. The steps of inference in reaching this conclusion are small ones. In other areas of research, only negligible or no differences have been found between civilian and military populations. There is no apparent reason why the same should not be true in regard to the variable of group size. Moreover, some of the phenomena adverted to in Ballew are statistical and have nothing to do with the social characteristics of the population from which a jury is drawn.

Sincerely yours,

/s/ DR. MICHAEL J. SAKS, PH.D.
Dr. Michael J. Saks, Ph.D.
Department of Psychology
Boston College
Chestnut Hill,
Massachusetts 02167

FIGURE 1. Possible relationships between jury size and conviction rates in two different populations.



Supreme Court, U.S.
FILED
MAR 21 1989
CLERK

No. 88-1239

In the Supreme Court of the United States

OCTOBER TERM, 1988

TONY J. VIOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
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Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
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28 pp

QUESTION PRESENTED

Whether Articles 16(1)(A) and 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. 816(1)(A) and 852(a)(2) (1982 & Supp. V 1987), violate the Constitution by permitting a defendant to be convicted by the two-thirds vote of a court-martial panel containing as few as five members.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1239

TONY J. VIOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a-2a) affirming petitioner's conviction is not yet officially reported. The opinion of the Army Court of Military Review (Pet. App. 3a-35a) is reported at 26 M.J. 822.

JURISDICTION

The judgment of the Court of Military Appeals was entered on December 1, 1988. The petition was filed on January 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1986).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Camp Casey in the Republic of Korea. He was convicted of premeditated

murder, in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918. He was sentenced to confinement for life, total forfeiture of pay, a reduction in rank, and a dishonorable discharge. The Army Court of Military Review affirmed the findi ıgs and sentence. The Court of Military Appeals granted review and summarily affirmed.

1. Petitioner and the victim were members of the same tank platoon. Petitioner was a Private First Class. The victim, Jon R. Watson, was a corporal, and, as such, occasionally supervised petitioner's work. Tr. 1090-1092. Petitioner disliked Corporal Watson. Tr. 761, 763, 1164-1165; Pet. App. 28a. That dislike began after petitioner's commanding officer imposed nonjudicial punishment on petitioner for being insubordinate to Corporal Watson. Tr. 744, 821.[1] Petitioner blamed Corporal Watson for that punishment and offered another soldier $50 if the soldier would "beat the shit" out of Watson.[2] Tr. 791-792, 1166.

During the weekend of March 1-3, 1986, 17 members of petitioner's platoon went on a ski trip to the Dragon Valley Ski Resort in Yong Pyong, Korea. The platoon leader organized the trip to reward the platoon following a field training exercise, and to allow the soldiers to relax. Tr. 505, 837-838, 1091. On the evening of March 2, a number

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[1] Nonjudicial punishment is a form of minor punishment authorized by the UCMJ. 10 U.S.C. 815 (1982 & Supp. V 1987). Petitioner's punishment was to perform "extra duty," which was to be completed after normal working hours. Tr. 1094.

[2] Petitioner made no secret of his intense dislike for Corporal Watson. He admitted expressing his contempt for Corporal Watson to other members of the platoon, Tr. 1165, and he admitted that he was "dead serious" when he tried to pay another soldier to beat up Watson. Tr. 1166. A fellow soldier testified that petitioner purchased a ski mask in November 1985 to conceal his identity because he was going to "kick Corporal Watson's ass." Tr. 1040.

of the platoon members gathered in the lobby of their hostel to play the game "Trivial Pursuit." Petitioner played and drank alcoholic beverages.[3] Tr. 896. At approximately 11:30 p.m., petitioner and Corporal Watson followed two other soldiers to a discotheque, which they discovered was closed. Tr. 510-511, 857-859, 1111; Pet. App. 5a. While the other two soldiers walked to a nearby bar, petitioner led Corporal Watson toward a dark part of the resort. Tr. 1120, 1172. Shortly thereafter, petitioner killed Corporal Watson.[4]

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[3] Petitioner's platoon leader, First Lieutenant Clays, testified that petitioner's alcohol consumption did not affect his behavior, that he played the game for four hours (ending at 11:30 p.m.), and that petitioner was in control of his actions at the end of the game. Tr. 841. On the other hand, Lieutenant Clays and several other witnesses testified that Corporal Watson was noticeably intoxicated, so much so that he could not play the game and could not be expected to defend himself or start a fight. Tr. 842-843, 866, 881-883. The Army Court of Military Review specifically found that both petitioner and his victim were "somewhat intoxicated, the victim more so than [petitioner]." Pet. App. 29a.

[4] At trial petitioner claimed that he acted in self-defense and that he lacked an intent to kill. Petitioner's story was as follows: He and Corporal Watson had crossed paths with two Koreans after leaving the discotheque. Tr. 1123-1124. Corporal Watson wanted to fight the Koreans, but petitioner restrained him. Corporal Watson then turned on petitioner, kicking him in the groin. Tr. 1126. Corporal Watson provoked petitioner to fight. Tr. 1128-1132. The fight ended when petitioner first kicked Watson in the face, then hit him with a stick. Tr. 1144. Petitioner admitted trying to hide the stick and hiding Watson's wallet. Tr. 1146-1148. Petitioner also admitted that he cleaned the blood off his shoes. Tr. 1150. The Army Court of Military Review found that petitioner's attack on Corporal Watson was unprovoked by any physical or verbal aggression by the victim, Pet. App. 30a-31a, and that "the defense's theory of the case is implausible." *Id.* at 23a. That court also concluded that petitioner's blows were calculated to kill, not merely to wound, as shown by the concentration and severity of the blows.

Petitioner returned to the hostel at approximately 12:16 a.m. Tr. 907. Another soldier, Sergeant Greene, asked him where he left Corporal Watson. Petitioner stated at various times that he left Corporal Watson at the discotheque, by the swimming pool, and at the front desk of the hostel. *Ibid.*[5] A search party was organized, but did not locate Corporal Watson. Tr. 908, 914.

Corporal Watson's body was found the next morning. Tr. 703; Pet. App. 6a. Nearby was a length of wood with blood on one end of it. Tr. 709-710; GX 21, 22; Pet. App. 7a.[6] Blood was also found on a wall near the body, indicating that the victim had been struck while on the ground. Tr. 1287, 1289; GX 8, 9. An autopsy revealed that Corporal Watson's death had been caused by a number of blunt force blows to his head. Tr. 623.

When Corporal Watson's body was found, his pants were unbuttoned and the zipper was open. GXs 8-10. Petitioner told one of the witnesses that he had hit Corporal Watson from behind with a pole while Watson was urinating. Pet. App. 9a.

Shortly after Corporal Watson's body was discovered, all of the platoon members were gathered together, informed of the death, and told that they would need to make statements. Petitioner asked two fellow soldiers to help him "get the bloody sweat pants out of my bag." Tr. 707, 771. Petitioner told another soldier that he had hidden Corporal Watson's wallet. Tr. 708; Pet. App. 9a. The wallet was later recovered from a snowbank not far from the body. The Army Court of Military Review determined

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[5] At trial petitioner admitted giving several inconsistent responses to Sergeant Greene. Tr. 1154.

[6] The stake, GX 23, was found bracing a nearby tree with the bloody end placed in the snow. The stake was placed so as to resemble similar stakes used as supports for young trees. Tr. 709, 959.

from that evidence that petitioner had hoped that the investigators would conclude that the murder was committed during the course of a robbery. Pet. App. 32a.

2. Pursuant to its authority under Art. I, § 8, Cl. 14, of the Constitution to "makes Rules for the Government and Regulation of the land and naval Forces," Congress has enacted the Uniform Code of Military Justice, which governs the size, selection process, composition, and voting procedures of courts-martial. Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A) (Supp. V 1987), provides that general courts-martial shall consist of at least five members, although any greater number is permissible. Article 25(d)(2) of the Code, 10 U.S.C. 825(d)(2), directs the court-martial convening authority[7] to select as court-martial panel members "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament."[8] Article 25(c)(1) of the Code, 10 U.S.C. 825(c)(1) (Supp. V 1987), allows an enlisted defendant to insist that at least one-third of the court-martial panel be made up of enlisted personnel equal to or

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[7] A "convening authority" is a commander who is authorized to convene a court-martial pursuant to Articles 22-24 of the UCMJ, 10 U.S.C. 822-824 (1982 & Supp. V 1987), and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States – 1984 (Manual)*. The duties of the convening authority include the selection and appointment of court-martial panel members (a practice commonly known as "detailing" members of a court-martial), directing that the accused be tried by the court-martial for the charged offenses (a practice commonly known as the "referral" of charges to a court-martial), and a post-trial review of the proceedings. See Arts. 25, 34, 60, UCMJ, 10 U.S.C. 825, 834, 860 (1982 & Supp. V 1987); see also Rules 503, 601, 1107, *Manual*.

[8] Before the court-martial panel is assembled, the convening authority is free to add, delete, or substitute panel members. Arts. 25, 29, UCMJ, 10 U.S.C. 825, 829 (1982 & Supp. V 1987).

senior in rank to the defendant and from a different military unit, unless physical conditions or military exigencies prevent such persons from being assigned to a court-martial. Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), requires a two-thirds majority vote of the panel members for a finding of guilty of all crimes not carrying a mandatory death sentence.[9] On sentencing, a two-thirds majority vote is necessary for a sentence of imprisonment less than ten years, a three-fourths majority is required for sentences of ten years' incarceration or more, and a unanimous vote is necessary to impose the death penalty.[10] The military justice system does not provide for a retrial in the event that the panel is unable to agree by the necessary majority. When that occurs, the defendant is automatically acquitted. Rule 921(c)(3), *Manual.*

3. Petitioner's trial convened on April 21, 1986. He pleaded not guilty and requested that the court-martial panel be composed of both officer and enlisted members. Tr. 8. Originally, nine members were detailed to petitioner's court-martial. Tr. 226. The trial judge granted two of petitioner's three challenges for cause. Tr. 424-427. Each party exercised one peremptory challenge, Tr. 428, leaving a court-martial panel consisting of five members. The defense then moved the trial court to hold that the Sixth Amendment jury trial right applied to courts-martial and that the panel, consisting of less than six members,

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[9] Rule 1004, *Manual*, requires a unanimous verdict as a prerequisite to the imposition of the death penalty.

[10] See *Mendrano* v. *Smith*, 797 F.2d 1538, 1540-1541 (10th Cir. 1986); *United States* v. *Shroeder*, 27 M.J. 87 (C.M.A. 1988), cert. denied, No. 88-873 (Feb. 21, 1989); *United States* v. *Morphis*, 7 C.M.A. 748, 752-754, 23 C.M.R. 212, 216-218 (1957); *United States* v. *Walker*, 7 C.M.A. 669, 673-675, 23 C.M.R. 133, 137-139 (1957).

violated the Sixth Amendment. The trial judge denied petitioner's motion. Tr. 440.

Following the presentation of the evidence, the trial judge instructed the panel, without defense objection, that the concurrence of four out of the five members was required for any findings of guilty. Tr. 1475. He further instructed the panel members that if they reached a unanimous finding of guilty to premeditated murder or felony murder, that unanimity should be announced. Tr. 1476. The president of the panel announced that two-thirds of the panel found petitioner guilty of premeditated murder. Tr. 1481, 1489-1490.

4. The Army Court of Military Review affirmed, Pet. App. 3a-35a, noting that challenges of the nature that petitioner now makes have been repeatedly rejected. *Id.* at 34a. The Court of Military Appeals granted review on the issue presented by petitioner and summarily affirmed. *Id.* at 1a-2a.

ARGUMENT

In *Ballew* v. *Georgia,* 435 U.S. 223 (1978), the Court held that the Sixth and Fourteenth Amendments require that at least six persons serve on the jury in serious state criminal cases. In *Burch* v. *Louisiana*, 441 U.S. 130 (1979), the Court ruled that the verdict by such a six-person jury must be unanimous. Relying on *Burch* and *Ballew*, petitioner contends that his conviction by four members of a five-member court-martial panel violates the Due Process Clause of the Fifth Amendment. That contention does not warrant review by this Court.[11]

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[11] This Court has previously denied certiorari in several other cases presenting substantially the same question. *Johnson* v. *United States*, cert. denied, 109 S. Ct. 69 (1988); *Hargrove* v. *United States*, cert. denied, 109 S. Ct. 76 (1988); *Mason* v. *United States*, cert. denied, 108

1. Petitioner has not properly preserved his unanimity claim. At trial, petitioner relied solely upon the claim that the Sixth Amendment applies to trials by courts-martial and requires that the court-martial consist of at least six members. Tr. 431, 438. Petitioner did not contend, as he does now (Pet. i, 16 n.3), that due process requires a unanimous verdict. Tr. 431-438. Before this Court, petitioner has not pressed his Sixth Amendment claim (Pet. 16), but urges that a court-martial panel must consist of at least six members and that the vote of a six-member panel must be unanimous. His purpose in adding the unanimity argument is clear: If the court-martial had consisted of six members, the military rule requiring a two-thirds majority vote to convict would have required the concurrence of only four members, which was the same number required to convict with a panel of five. Because petitioner did not raise the unanimity claim at trial, however, the trial judge's instructions to the panel regarding the degree of concurrence required to convict cannot be held erroneous unless they amounted to plain error. For the reasons discussed below, petitioner cannot meet that standard.

2. There is no conflict among the circuits on the question presented by petitioner. The military courts have consistently rejected the claim that the court-martial system established by Congress is invalid under *Burch* v. *Louisiana, supra,* and *Ballew* v. *Georgia, supra,* because a servicemember may be convicted by a two-thirds vote of the court-martial panel. *United States* v. *Mason,* 24 M.J. 127, 128 & n.* (C.M.A. 1987), cert. denied, 108 S. Ct. 257 (1987); *United States* v. *Hutchinson,* 17 M.J. 156,

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S. Ct. 257 (1987); *Delacruz* v. *United States*, cert. denied, 481 U.S. 1052 (1987); *Dodson* v. *United States,* cert. denied, 479 U.S. 1006 (1986); *Garwood* v. *United States*, cert. denied, 474 U.S. 1005 (1985); *Hutchinson* v. *United States*, cert. denied, 469 U.S. 981 (1984).

156-157, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984); see *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986); *United States* v. *Kemp*, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973) (the Sixth Amendment cross-section requirement is inapplicable to court-martial panels). The decisions of that court are consistent with the decision of the only federal court of appeals to consider the issue in light of this Court's decisions in *Burch* and *Ballew*. *Mendrano* v. *Smith*, 797 F.2d 1538, 1544-1547 (10th Cir. 1986).

3. The decision below is correct. The statutes governing the number of members on court-martial panels and the number that must concur to return a verdict do not offend either the Fifth or Sixth Amendments to the Constitution.

a. Petitioner seeks to impose on courts-martial the same requirements that Art. III, § 2, Cl. 3, and the Sixth Amendment impose in civilian cases. It is well settled, however, that the right to a jury trial that is guaranteed by those provisions does not apply to court-martial proceedings. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858).[12] The Fifth Amendment specifically exempts

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[12] See also *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States*, 107 S. Ct. 2924 (1987); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921); *Mendrano* v. *Smith*, 797 F.2d at 1544; *King* v. *Moseley*, 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley*, 289 F.2d 751, 752 (7th Cir. 1961). See *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate the Sixth Amendment). See generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial*

"cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan,* 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin,* 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Article III or Sixth Amendment right to a trial by a petit jury, he also had no right under those provisions to a unanimous vote by a jury composed of at least six persons.

b. Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States,* 107 S. Ct. 2924, 2931 (1987). See also *Burns* v. *Wilson,* 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the composition and voting procedures of a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter

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and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957).

appropriate for congressional action," *Whelchel* v. *McDonald,* 340 U.S. 122, 127 (1950) (citations omitted),[13] but also because the practices at issue have been carried forward from the earliest days of our nation. Cf. *Solorio* v. *United States,* 107 S. Ct. at 2928-2930.

The nation's first military law was the American Articles of War of 1776. 1 & 2 W. Winthrop, *Military Law and Precedents* 47, App. 961-971 (2d ed. 1920). Section 14, Art. 1, provided that at least 13 officers would serve on general courts-martial (*i.e.,* a president and 12 members). 5 J. Continental Cong. 800 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra,* App. 967. In 1782, Congress substantially adopted the English practice for naval courts-martial of detailing five officers to a court-martial in a capital case and three in a noncapital case. 22 J. Continental Cong. 325 (G. Hunt ed. 1914). Four years later, when large numbers of desertions and an understaffing of officers had become a particularly acute problem for commanders at frontier outposts, Congress amended the American Articles of War to permit a quorum of five officers at a general court-martial and three officers at regimental courts-martial when 13 members could not be detailed "without manifest injury to the service." 30 J. Continental Cong. 145, 316 (J. Fitzpatrick ed. 1934); 1 & 2 W. Winthrop, *supra,* at 22-23, App. 972; Van Loan, *The Jury, the Court-Martial, and the Constitution,* 57 Cornell L. Rev. 363, 384-385 n.118 (1972). That language was merely advisory to the officer responsible for appointing the members of a court-martial, however, and his decision to select a small number of members was both lawful and

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[13] See also, *e.g., Rostker* v. *Goldberg,* 453 U.S. 57, 64-65 (1981) (the decisions of Congress are entitled to particular deference when they involve "Congress' authority over national defense and military affairs").

conclusive. *Martin* v. *Mott,* 25 U.S. (12 Wheat.) 19, 34-35 (1827).[14]

Congress endorsed that practice throughout the nineteenth century and the early part of the twentieth century when revising the Articles of War. 1 & 2 W. Winthrop, *supra,* at 77, 159; American Articles of War of 1806, ch. 20, Art. 64, 2 Stat. 367, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 981-982; American Articles of War of 1874, Art. 75, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 992; American Articles of War of 1916, ch. 418, Art. 5, 39 Stat. 651. In the aftermath of World War II, Congress replaced the Articles of War with the Uniform Code of Military Justice. In so doing, Congress retained the requirement of a quorum of five members for general courts-martial, as well as the convening authority's discretion to detail a greater number of panel members, the system that exists today. Art. 16, UCMJ, 10 U.S.C. 816 (1982 & Supp. V 1987).

History also shows that unanimity has never been a feature of court-martial proceedings.[15] The American Articles of War of 1776, like their predecessor, the British Articles of War,[16] required only a simple majority vote

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[14] See also *Bishop* v. *United States,* 197 U.S. 334, 339-340 (1905); *Mullan* v. *United States,* 140 U.S. 240, 245 (1891) (convening officer's determination that trial by members junior in rank to the accused could not be avoided was proper).

[15] During the Revolution, the Continental Congress adopted the British naval regulations for use by the Continental Navy. The British regulations provided for courts-martial similar to the general courts-martial under the British Articles of War, which required only a simple majority to convict and sentence a defendant. Van Loan, *supra,* 57 Cornell L. Rev. at 382 & n.102.

[16] The British Articles of War required a vote of 9 of 13 court-martial members to impose the death penalty. 1 & 2 W. Winthrop, *supra,* App. 943, § 15, Art. VIII. The Articles of War did not specify

to convict a defendant and a two-thirds majority to sentence him to death. Articles of War of 1776, § 14, Art. 5, *reprinted in* 5 J. Continental Cong. 801 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra*, at 377, App. 968; A. Macomb, *A Treatise on Martial Law and Courts-Martial* 144 (1809). Congress thereafter repeatedly endorsed similar majority vote requirements in statutes passed in 1800, 1806, 1862, and 1874.[17] Throughout the nineteenth century, a majority vote of the panel members was sufficient to convict a defendant of a noncapital crime, with a two-thirds vote sufficient to impose capital punishment. 1 & 2 W. Winthrop, *supra,* at 377; *Stout* v. *Hancock,* 146 F.2d 741, 742-743 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945).

Early in the twentieth century, Congress modified the voting requirements for Army courts-martial, requiring a unanimous vote to impose the death penalty or to convict a defendant of a crime carrying a mandatory death penalty. Act of June 4, 1920, ch. 227, Art. 43, 41 Stat. 795-796; *Stout* v. *Hancock,* 146 F.2d at 741-743. For all other crimes, conviction required only a two-thirds majority. At the same time, the voting requirements for courts-martial

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the number of votes necessary to convict a defendant at a general court-martial or to impose any sentence other than death. The Articles of War, however, provided that inferior courts-martial "shall give Judgment by the Majority of Voices." 1 & 2 W. Winthrop, *supra*, App. 943, § 15, Art. XII. See R. Scott, *The Military Law of England* 131 (1810).

[17] Act of Apr. 23, 1800, ch. 33, § 1, Art. 41, 2 Stat. 51 (An Act for the Better Government of the Navy of the United States); American Articles of War of 1806, ch. 20, Art. 87, 2 Stat. 369, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 984; Act of July 17, 1862, ch. 204, Art. 19, 12 Stat. 605 (An Act for the Better Government of the Navy of the United States); American Articles of War of 1874, Art. 96, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 994.

in the Navy were left untouched. Thus, only a simple majority was necessary to convict a sailor, and a two-thirds majority to impose the death penalty. See H. R. Rep. No. 491, 81st Cong., 1st Sess. 26, 74 (1949). When considering the UCMJ following World War II, Congress adopted Article 52 of the UCMJ, 10 U.S.C. 852, in substantially its present form.[18]

In 1984, Congress amended the UCMJ to coincide with proposed changes to the *Manual for Courts-Martial.* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. Concurrently, the President, acting pursuant to his rule-making authority, promulgated the current *Manual.* In 1986, Congress enacted additional changes to the UCMJ, including the addition of Article 106a, 10 U.S.C. 906a (Supp. V 1987), an espionage statute that provides for capital punishment. That year, the President modified the *Manual* to limit the imposition of the death penalty to those cases in which the court-martial panel members unanimously find the defendant guilty of an offense for which Congress has authorized the death penalty, and then only if the court finds at least one enumerated aggravating factor. Rule 1004, *Manual*; Exec. Order No. 12,550, 3 C.F.R. 192 (1986 comp.). Neither Congress nor the President sought to extend the unanimity requirement to other situations. In sum, it is clear that the five-member, two-thirds majority vote procedures in Articles 16(1)(A) and 52(a)(2) of the UCMJ, 10 U.S.C. 816(1)(A) and 852(a)(2) (1982 & Supp. V 1987), represent the longstanding and considered judgment of Congress and the President on the proper balance to be struck between

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[18] In so doing, Congress decided not to extend the unanimous vote requirement to noncapital crimes. See *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 1081-1082 (1949).

the rights of an individual serviceman and the special needs of the armed forces.

That judgment is a reasonable one. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to serve as court-martial panel members, "the basic fighting purpose of armies is not served." *Ibid.* Congress therefore has determined that the diversion of resources necessary to conduct the retrials that would result from a unanimous verdict requirement is too high a price to pay in terms of lost military preparedness.[19] Accordingly, Congress provided for only one trial, at which a two-thirds majority vote would suffice to convict.[20]

The military justice system does not exclusively favor the prosecution. The rule that no retrials are permitted in the military if there is a "hung jury" provides a defendant with "a significant recompense" for the disadvantages of not requiring a unanimous verdict. *Mendrano* v. *Smith,* 797 F.2d at 1546. Moreover, as a safeguard against an in-

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[19] Petitioner contends (Pet. 36) that requiring six members and unanimity would not require retrials, because it would apply only to those cases "where *mens rea* and not *actus rea* is in dispute." While petitioner's scenario holds true for this case, it is not true for all premeditated or felony murder cases. In particular, petitioner's argument would not necessarily be true where the defense of alibi is raised. Further, petitioner provides no reason why premeditated murder and felony murder should require unanimity while convictions of other offenses for which death or life imprisonment are authorized (*e.g.*, espionage and rape, Art. 106a, UCMJ, 10 U.S.C. 906a (Supp. V 1987) and Art. 120, UCMJ, 10 U.S.C. 920) could be accomplished by two-thirds majority vote.

[20] That judgment is certainly reasonable in a case like this one, which was prosecuted in an overseas region (Korea) that is still regarded as a combat zone.

accurate verdict by a court-martial panel, the military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. The standard of review applied by a court of military review to determine whether the evidence is sufficient to support the defendant's conviction substantially differs from, and is more generous to military defendants than, the standard employed by civilian appellate courts. A civilian appellate court does not inquire whether it believes that the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt, but instead only determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). By contrast, a court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c).[21]

In addition to the more exacting standards of appellate review, the military defendant enjoys greater rights than his civilian counterpart at the pretrial and post-trial stages of the proceedings. No charge may be referred to a general

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[21] A court of military review may affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 886(c). Although nothing in the text of the statute or its legislative history suggests that the courts of military review must independently apply the "beyond a reasonable doubt" standard to the record when reviewing the sufficiency of the evidence, see *Jackson* v. *Taylor*, 353 U.S. 569, 577 & n.8 (1957), the military courts have read that standard into the Act. *E.g.*, *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977).

court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. That procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a) (Supp. V 1987). After trial, the convening authority receives a report of the trial, and he may disapprove findings of guilt or reduce the sentence as a matter of clemency or as a prerogative of command. Art. 60, UCMJ, 10 U.S.C. 860 (Supp. V 1987). To assist the convening authority, the accused has the right to submit legal arguments and other matters with respect to the findings and sentence. *Ibid.* See generally, *United States* v. *Boland*, 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970). In light of these special protections against the risk of inaccurate verdicts in the military justice system, petitioner has not made the "extraordinarily weighty" case necessary to overcome the longstanding congressional judgment that the court-martial system satisfies due process requirements. *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).

There is also no merit to the specific objections that petitioner asserts (Pet. 15, 24) to his trial. Petitioner's conviction is not invalid because his court-martial panel was not randomly selected from a pool containing all servicemen, including enlisted personnel of the same rank as petitioner. *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate Sixth Amendment); *United States* v. *McClain*, 22 M.J. at 128 (Sixth Amendment cross-section

requirement inapplicable to court-martial proceedings); see *Mendrano* v. *Smith*, 797 F.2d 1544-1547. Moreover, the fact that a military defendant receives only one peremptory challenge is of no significance, since a civilian defendant has no constitutional right to peremptory challenges at all, much less to any specific number of them. *Batson* v. *Kentucky*, 476 U.S. 79, 91 (1986); *id.* at 108 (Marshall, J., concurring) (collecting cases); *Stilson* v. *United States*, 250 U.S. 583, 586 (1919). Finally, there is no merit to petitioner's claim that the exclusion from the court-martial panel of servicemembers who would not consider imposing the death penalty violated due process. This Court has twice recently rejected that precise claim. *Buchanan* v. *Kentucky*, 107 S. Ct. 2906, 2913-2916 (1987); *Lockhart* v. *McCree*, 476 U.S. 162 (1986).

4. Petitioner argues that the nonunanimous verdict of a five-member court-martial is inherently unreliable. To support that claim, petitioner relies on the studies cited in the lead opinion in *Ballew* v. *Georgia*, 435 U.S. at 231-243 (opinion of Blackmun, J.), which relied heavily on empirical studies of the group dynamics of civilian juries. Much of the same reasoning formed the basis for the decision in *Burch* v. *Louisiana*, 441 U.S. at 138. There are no comparable studies, however, that have addressed the dynamics of courts-martial panels.[22] In light of the func-

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[22] Petitioner argues (Pet. 26-32) that the conclusions drawn from studies of civilian juries should be applied to court-martial panels and that they rebut the conclusions in *United States* v. *Guilford*, 8 M.J. 598 (A.C.M.R. 1979), pet. for review denied, 8 M.J. 242 (C.M.A. 1980), on which the court of military review relied. Pet. App. 34a. In support of his argument, petitioner relies on an undated letter from Professor Saks that was not submitted at trial. *Id.* at 36a-45a. Professor Saks admits that he knows of no studies involving court-martial panels similar to those conducted with juries. *Id.* at 37a-38a. He admits that he is unfamiliar with the procedures used in courts-martial.

tional and compositional differences between civilian juries and courts-martial panels, the studies on which *Burch* and *Ballew* relied are not immediately applicable to the military setting. *United States* v. *Guilford*, 8 M.J. 598, 601-602 (A.C.M.R. 1979), pet. for review denied, 8 M.J. 242 (C.M.A. 1980).[23] Given the special deference due to Congress's judgments in this area, the question whether studies of the type relied upon in *Ballew* justify a change in the UCMJ should be left to Congress.[24]

5. Petitioner suggests (Pet. 9-10) that this Court's recent decision in *Solorio* v. *United States, supra,* requires a different result. He argues that the procedures at issue may have been permissible before *Solorio*, but are no longer justified now that the Court has eliminated the service-connection restriction on courts-martial. That argument is misdirected.

The *Solorio* decision did not abolish the service-connection requirement; it merely reaffirmed the traditional principle that a crime is sufficiently service-connected for purposes of court-martial jurisdiction if the

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Id. at 38a. He is therefore unable to address any effects that may result from the dissimilarities between courts-martial and jury trials.

[23] In *Burch,* the Court concluded that juries must have at least six members, in part "to provide a fair possibility that a cross section of the community would be represented." 441 U.S. at 135, citing *Williams* v. *Florida,* 399 U.S. 78, 100 (1970). That goal is inapplicable to courts-martial. The members of a civilian jury are selected at random to represent a cross-section of the community. By contrast, the members of the court-martial panel are deliberately chosen on the basis of their qualifications to sit as panel members. Art. 25, UCMJ, 10 U.S.C. 825 (1982 & Supp. V 1987).

[24] An excellent analysis of the separate nature of military society, past and present, and the reasons why Congress is the branch of government best suited to deal with military justice, is contained in Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights,* 62 N.C. L. Rev. 177 (1984).

defendant is a servicemember at the time of the commission of the crime and at the time of trial. The effect of *Solorio* is not to convert the military justice system into one closely analogous to a civilian system, in which Fifth and Sixth Amendment principles apply just as they do in the civilian courts. *Solorio* simply restored court-martial jurisdiction to a class of cases, not covered during the 18-year period following *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), consisting of certain cases in which the crimes were committed by servicemembers off the premises of military bases. The rules regarding the number and voting requirements of court-martial panels were adopted prior to the Court's decision in *O'Callahan*, not during the period between *O'Callahan* and *Solorio*. Moreover, there is no historical or logical connection between the service-connection restriction, as applied in *O'Callahan*, and the court-martial rules at issue here. The decision in *Solorio* therefore has no bearing on the validity of those rules in the military justice system.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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